No. 15,123

IN THE

United States Court of Appeals

For the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

OPENING BRIEF OF APPELLANTS W. A. ROBISON, AS ADMINISTRATOR OF THE ESTATE OF ROBERT RUSSELL SIDEBOTHAM, AND FRANK J. FONTES AND DELGER TROWBRIDGE ON APPLICATION FOR ALLOWANCE OF EXPENSES OF DEFENSE.

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FRANK J. FONTES,
DELGER TROWBRIDGE,
Appellants.

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This is an appeal from the order of the Honorable District Court denying allowance of expenses of defense dated and filed March 27, 1956 (Tr. 55-56).

The record consists only of the verified petition of W. A. Robison as said administrator and of his attorneys Frank J. Fontes and Delger Trowbridge for allowance of expenses of defense, including attorneys'

fees (Tr. 50-55), which was filed February 27, 1956 and the order denying this petition which was filed on March 27, 1956 (Tr. 55-56). There was no counter-affidavit or evidence produced on behalf of the plaintiff in opposition to the petition, although her attorney made an argument against it (Tr. 255-260). The petition itself, which was verified, contained a full summary of all of the services performed by Frank J. Fontes and Delger Trowbridge as attorneys for W. A. Robison as said administrator, which consisted of the usual steps in defending an action through trial and through settlement of findings to judgment. In paragraph IV W. A. Robison as administrator also stated the moneys which he had spent in defending said action. In paragraph V, the last paragraph, petitioner alleged

> "The above entitled action was defended by said Public Administrator through his counsel above named in good faith and on reasonable grounds. The defense of said action was necessary for the proper protection and preservation of the properties and assets of Robert Sidebotham, deceased." (Tr. 54.)

Since the only opposition to the petition was in the nature of a legal argument, these allegations as well as all of the other allegations in the petition must be taken as true.

THE LAW.

APPELLANT W. A. ROBISON AS ADMINISTRATOR IS ENTITLED TO BE AWARDED ALL HIS NECESSARY EXPENSES INCURRED TO DEFEND ANY ASSETS IN HIS POSSESSION FORMERLY BELONGING TO ROBERT SIDEBOTHAM, DECEASED.

The theory of plaintiff in the action commenced by her is that the assets held by W. A. Robison as administrator were formerly community property of herself and Robert Sidebotham, deceased, and that he is holding a half interest in them now as trustee for her; as a corollary to this she contends that the assets are not properly subject in any way to the jurisdiction of the San Francisco Probate Court and that the District Court could not therefore authorize the spending of any of it for any purpose by the administrator defending this action.

If the judgment is reversed and defendant W. A. Robison as said administrator wins a final judgment in the federal District Court no problem as to the awarding of expenses of defense will ever arise in that Court or in this Court because they will be awarded out of the probate assets being administered by the San Francisco Probate Court. If on the other hand this judgment is affirmed then we respectfully submit this Honorable Court must find that the administrator, who admittedly acted in good faith and reasonably in defending said action in the Court below, must be reimbursed for all his proper expenses, including reasonable attorneys' fees by an order of the District Court below.

Assuming that the administrator is holding the assets in trust, it would make him an involuntary trustee for the benefit of said plaintiff. He would then be in the same position as the State Building and Loan Commissioner was in the case of *Eggert v. Pacific States Savings and Loan Association,* 53 C.A. (2d) 554 at 556 and 558, 127 P. (2d) 999, 1001.

This was an action in equity to declare a trust in certain assets in the hands of the State Building and Loan Commissioner, who had seized the assets of the Pacific States Savings and Loan Association for administration because of its insolvency; it was contended that these were not assets of the Pacific States Savings and Loan Association which claimed title to them by outright purchase, but were assets of the Fidelity Savings and Loan Association (also in liquidation), held in trust for it by the Pacific States Association and that the Building and Loan Commissioner therefore was merely holding them as a trustee for the benefit of the Fidelity investors. The Fidelity investors prevailed in the action on the ground that they were trust assets belonging to Fidelity investtors. Since the Building and Loan Commissioner was administering the assets of *both* Pacific States Savings and Loan Association *and* Fidelity Savings and Loan Association he was on both sides of the fence and could not defend the action against the Fidelity Association. In this situation the attorneys for the Pacific States Association took over the defense of the Fidelity Association action. The attorneys representing the Pacific States Savings and Loan As-

sociation, which held all the Fidelity assets when it was seized, were allowed compensation for their services out of the Fidelity assets in the hands of the Building and Loan Commissioner, *even though their defense was not successful.*

In approving the allowance of the attorneys' fee to the attorneys for the Pacific States Savings and Loan Association, as holder of the Fidelity assets when Pacific States was seized, the Court disposed of the argument that the Superior Court had no jurisdiction in the trust suit to allow attorneys' fees to the attorneys for the Pacific States Savings and Loan Association in the following words:

> "This proposition is untenable. Appellant (Building and Loan Commissioner) after taking possession of the assets of Fidelity and Pacific States, occupied the status of trustee of the assets of each of said corporations (Evans v. Superior Court, 14 Cal. 2d 563, 673, 96 P. 2d 107), and it was his duty as such trustee to take all reasonable means for the protection of these assets for the benefit of the respective corporations, their stockholders, investment certificate holders, and creditors. Hence, when plaintiff sought to have a trust imposed upon certain assets of the Pacific States, it was appellant's duty to defend against this attempt to impress a lien upon the assets of the trust which he was administering."
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> . . . . . .
>
> "The above entitled action was defended by Pacific States through its counsel of record, the firm of O'Melveny & Myers, in good faith and on reasonable grounds. The defense of said action

was necessary for the proper protection and preservation of the business, properties and assets of Pacific States in the possession of intervener Ralph W. Evans, and said defense inured directly to the benefit of said business, property and assets in the possession of said intervener as Building and Loan Commissioner of the State of California and as well to the benefit of primarily, the creditors and certificate holders of Pacific States and, secondarily, petitioner itself."

The same rule is followed in the federal Courts.

The general subject of allowances for counsel fees out of funds before equity Courts is well discussed by Mr. Justice Frankfurter in *Sprague v. Ticonic Bank,* 307 U.S. 161, 163, 59 S. Ct. 777, 778, where he explained that in many cases equity allows attorneys' fees in order "to do justice".

The Courts have approved such allowances in:

Managhan v. Hill, 140 F. (2d) 31;

Crump v. Ramish, 86 F. (2d) 362 (9th Circ.);

Franz v. Buder, 82 F. Supp. 379, 385, where the learned judge discusses the right of a trustee to be reimbursed for *unsuccessfully* defending a suit in the following language:

"A trustee owes a duty to every conflicting interest, to preserve and safeguard the trust property, equally and for all. Clearly, he will not, and cannot, do this if upon every attack upon his trust, his attitude is to be mellowed by the fear of personal loss by way of attorney's fees, if he yield to demands, whether just or unjust, rather than resort to litigation to protect the trust.

"This action was not brought by, but against the Trustees. True, it has been said that their denial of plaintiff's interest provoked it. This is not unusual. I have referred already to the controlling question in the main action, that is, whether stock dividends were income or corpus. The Trustees owed a duty to the potential creditors of the personal estate of Sophie Franz. True, it happened, so far as I know, or the records show, that these were negligible. (There is, in fact, nothing in the record upon this point.) But such creditors might have been numerous. If they had been numerous, a duty which the Trustees were bound to observe, was owed to them. I am not able to see why a well-settled general rule ought to be whittled away to subserve the exigencies of an abnormal situation. It surely cannot be the law that if the trustees win in litigation against a trust estate, they may have attorney's fees allowed to them, but if they lose, they must pay such fees from their own pockets. Such a rule would be utterly destructive of a public policy, undoubtedly existing.

"The estate in dispute was either put into the hands of the trustees, or it was not. If it was, and litigation arose about it (and both of the above propositions are verities) then I think the Trustees were authorized to hire and pay attorneys to defend its integrity, even though the legal burden was initially on the life tenant to handle, invest and protect and conserve the remainder estate."

The same rule was laid down in the similar case of *Metzenbaum v. Metzenbaum,* 115 C.A. (2d) 395, 399,

252 P. (2d) 31, in which the Court stated the general rule as follows:

> "*We can conceive of no higher duty resting upon a trustee than that of defending against adverse claims to trust assets.* Indeed, failure to do so without sufficient justification would subject the trustee to liability for any loss resulting from such failure upon his part. True, the appellant as liquidating partner, like a trustee who is also a beneficiary of the trust, derived some personal benefit in successfully defending against the adverse claims to the partnership assets in question, as thereby his proportionate share of the net assets remaining after the payment of debts was increased. This, however, is but a fortuitous circumstance resulting from the performance of a fiduciary duty which he owed to the trust, and whereby valuable assets were preserved for the benefit of all persons interested therein, including the respondent. While respondent protests vigorously against any allowance to appellant in reimbursement of the attorneys' fees incurred in the defense of the dissolved firm's title to the royalties in question, we have no doubt that, if such a claim had been advanced by persons other than members of his own family with his consent and active cooperation, he would have been the first to complain of appellant's failure to defend against the same. Hence, we conclude that the trial court erred in its ruling that appellant was not entitled to reimbursement for attorneys' fees in a reasonable amount incurred by him in the defense of the Fanchon suit." (Italics ours throughout.)

See also *Spencer's Est.*, 18 C.A. (2d) 220, 222, 63 P. (2d) 875; *Dingwell v. Seymour*, 91 C.A. 483, 513,

267 Pac. 327, in which the counsel who conscientiously represented the trustee *unsuccessfully* were allowed reasonable attorneys' fees for their services *out of the trust assets.* The ruling of the Court is well stated in official headnote 16 as follows:

> "Where the special administrator of the estate of the trustor, by an action to quiet title as against said individual trustees, undertook to obtain all the property of the trust for the heirs and estate of the trustor, such action was not for the benefit of the trust, and the trial court should not have allowed him an attorney's fee; but in such action it was the duty of both the individual trustees and the corporate trustee to defend and maintain their respective trusts when attacked, and where they participated in the action in good faith and in compliance with such duty, an attorney's fee was properly allowable to both the individual trustees and the corporate trustee, *even though the corporate trust was void and without force* by reason of the priority and validity of the other trust."

This rule is well stated in Volume I of the Restatement of the Law of Trusts, section 188, at page 492, as follows:

> "The trustee can properly incur expenses for costs in maintaining or *defending* an action in the proper administration of the trust *even though he is unsuccessful in the action.*"

See also Vol. 2 of Scott on Trusts (2d ed., 1956), page 1402, section 188.4 as follows:

> "The trustee owes a duty to the beneficiaries to take reasonable steps to realize on claims which

> he holds in trust, and to resist claims which may result in a loss to the trust estate.
>
> . . . . . .
>
> Even though the trustee is unsuccessful in the litigation, he is entitled to charge the estate with the necessary expenses, if he was not himself at fault in causing the litigation."
>
> 90 C.J.S. 399-412.

The main ground apparently of the ruling of the Honorable District Court was that the expenses of the defense, including the attorneys' fees should be allowed by the Probate Court of San Francisco and paid out of the assets remaining in the Public Administrator's hands after the judgment in this case was satisfied (Tr. 257-260). The effect of such a ruling is to throw the expenses of defending this action entirely on the half of the estate *which was not before this Court* and to leave half of the assets, i.e. the fund in this litigation, into which the administrator was brought by service of process involuntarily, *free and clear of any liability* for his expenses of defending the action. This seems to appellants to be a highly unjust, unfair and inequitable result, not justified by any authority.

CONCLUSION.

It is our contention that based on the facts and the cases which we have cited, this Court should make an order reversing the order denying the petition for the allowance of the expenses of the defense of the action to said administrator and should direct the Honorable District Court to make findings as to whether this action was defended in good faith and whether it was reasonably necessary. If such findings are made by the Honorable District Court, then the Honorable District Court should be directed to ascertain the actual cash expenses paid by the Public Administrator in connection with the defense of this action, including the expenses of preparing the record and briefs in this Court, and to award also any other proper items of expense such as attorneys' fees in a reasonable amount to said administrator.

Dated September 10, 1956.

Respectfully submitted,

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FRANK J. FONTES,
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Appellants.